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The exercise of fiduciary powers for mixed purposes: A comment on *Eclairs Group Ltd v JKC Oil and Gas plc*

Posted on April 8, 2016 by Remus Valsan

Introduction

The proper purposes doctrine, also known as fraud on a power, is a cornerstone of the law of legal powers. The donee of a fiduciary power must exercise it only for the purposes for which it was conferred by the donor. For company directors, this rule is codified in s 171(b) of Companies Act 2006, which states that directors must “only exercise powers for the purposes for which they are conferred.” [\[1\]](#)

Directors, like other fiduciaries entrusted with the administration of another’s interests, enjoy a wide degree of authority that enables them to apply their business judgment in complex and rapidly changing contexts. Their decisions are often driven by several objectives and have multiple effects, proximate and remote. When a fiduciary is motivated by multiple purposes, all influential in different degrees, but some proper and some improper, the decision process is open to challenge. The judicial scrutiny of motives and purposes is a challenging task, akin to embarking on “a dark and unknown voyage across an exceedingly misty sea.” [\[2\]](#) What is the appropriate test for identifying the principal purpose? Is it possible to weigh all concurrent purposes and rank them in order of intensity? When improper purposes exist, is the decision liable to be set aside although the fiduciary exercised the power in complete good faith, with the sole aim of protecting the beneficiary’s interests?

In *Eclairs Group Ltd and another v JKC Oil and Gas plc* [\[3\]](#) the UK Supreme Court addressed these questions in the context of directors’ power to impose restrictions on voting and other rights attaching to shares. The decision clarifies the relation between the proper purposes rule and the duty to promote the success of the company, and suggests new developments regarding the test to determine the principal purpose. On the first point, the justices were in agreement that a genuine desire to protect the long term interests of the company will not validate the exercise of a power for a purpose that is outwith the range of purposes for which that particular power was granted. On the second point, the majority proposed, in *obiter*, a new test for identifying the principal purpose for which a power was exercised. When multiple purposes exist, it was argued, the principal purpose is the one but for whose presence the power would not have been exercised as it was. This is a departure from the current test, under which the principal purpose is the purpose about which directors felt the strongest. The other justices declined to express a conclusive view on the appropriate test, and appeared to hold strong reservations about the but-for test.

Eclairs, it is submitted, is a step in the right direction. The but-for test increases the certainty and predictability of directors’ exercise of powers, because it allows a decision to stand when it can be demonstrated that the directors would have adopted the same decision, had they placed appropriate focus on the permissible purpose. Nevertheless, this area of law remains uncertain until the but-for test is confirmed by the *ratio decidendi* of a Supreme Court decision.

The Facts

JKX Oil & Gas Plc was the parent company in a group whose main business consisted of development and exploitation of oil and gas reserves, primarily in Russia and Ukraine. The company was struggling, and the value of its shares fell to historically low levels. This made it vulnerable to hostile takeovers. The directors of JKX feared

that two of the company's minority shareholders, Eclairs Group Ltd and Glengary Overseas Ltd, planned to acquire control. Both these shareholders were controlled by Russian businessmen who had a reputation of corporate raiders.

In March 2013, Eclairs asked JKX to convene an extraordinary general meeting to consider ordinary resolutions for the removal of two directors and the appointment of three new directors. The proposed directors were associates of the two minority shareholders. JKX responded by issuing disclosure notices addressed to the minority shareholders and their controllers. The articles of association of JKX provided that the board had the power to issue a disclosure notice requesting information about persons interested in its shares, and the power to restrict the exercise of rights attaching to shares in the event of non-compliance. These powers were largely similar to those found in ss 793-797 of the Companies Act 2006. The disclosure notices requested information about the number of shares held, their beneficial ownership and any agreements or arrangements between the various persons interested in them, relating to the acquisition of shares in JKX, or to the exercise of any rights conferred by the holding of such shares. The responses came promptly. They admitted the existence of interests in JKX shares, but denied any agreements or arrangements. The directors considered that the responses were inadequate, because they believed that there were secret understandings between the addressees which they had not disclosed.

In April 2013, JKX convened the annual general meeting (AGM). The agenda included proposals for re-election of directors, and extending their powers to allot shares and disapply statutory pre-emption rights. In May 2013, Eclairs published several statements inviting the JKX shareholders to oppose the proposed AGM resolutions. Without the support of Eclairs and Glengary, the proposals requiring a special resolution were certain to fail, and those requiring an ordinary resolution were unlikely to pass.

Shortly before the AGM was due to take place, the JKX board resolved to exercise the power to issue restriction notices in relation to the shares held by Eclairs and Glengary, suspending their voting rights and restricting their transfer. Eclairs and Glengary challenged the board's exercise of this power. They advanced several grounds, including breach of the proper purposes rule in s 171(b) of the Companies Act 2006. The only proper purpose for which the power to restrict shareholders' rights could be exercised was to extract the relevant information. The board's real purpose, the minority shareholders argued, was to ensure that the resolutions at the forthcoming AGM would be passed.

The Court Decisions

The High Court

The minority shareholders were successful at first instance.[\[4\]](#)

Mann J found that the directors had reasonable cause to believe that the responses to the disclosure notices were false or materially incorrect, because they failed to provide information on agreements or arrangements as to the exercise of voting rights. He also established that all directors shared a genuine desire to obtain the information which they felt had been withheld from them, and were at all times animated by an honest intention to act in what they perceived to be in the best interests of the company. Nevertheless, their exercise of the power to impose restrictive notices was improper.

After extensive cross-examination of most of the directors, the judge reached the conclusion that their principal purpose was to disenfranchise Eclairs and Glengary, so as to maximise the prospects of passing the AGM resolutions. The majority of directors did not regard the extraction of proper information as the main purpose of the power to impose restrictions. They believed they could use the power in what they conceived to be the best interests of the company, without a link to the extraction of information. In this case, their main objective was to

hinder the cause of the raiders, with a view to benefit JKX in the long term.

Mann J disagreed with this approach. Although all directors genuinely believed that their decision was in the best interests of JKX, that did not change the fact that the power was exercised for an impermissible purpose. The only purpose for which the power to impose restrictions was conferred was to “provide a sanction or an incentive to remedy the default” in the disclosure.^[5] The desire to benefit the company as a whole was not in itself sufficient for imposing restrictions, but could have been an appropriate objective “in conjunction with a more legitimate approach to the decision to impose restrictions.”^[6]

Writing in *obiter*, Mann J went on to investigate what would have happened, had the directors confined themselves to the proper purpose of imposing restrictions as a means to compel the production of information. He found it “virtually inevitable” that that the directors would have reached the same decision and imposed the same restrictions.^[7] The crucial difference between what had happened and the hypothetical scenario was that in the latter case the imposition of the restrictions would have been primarily motivated by a desire to induce the provision of information, coupled with a perception that it would be appropriate to prevent the minority shareholders from voting while they were withholding information that was relevant to the directors and the other shareholders. In the hypothetical case, the directors’ strong views about the dangers that the raiders posed to JKX’s long term interests would have been a secondary consideration, and would not have affected the propriety of their decision. Since the hypothetical case was not pleaded and did not arise until the final stages of the trial, Mann J did not allow JKX to raise it and to claim that they would have reached the same decision.^[8] Consequently, he ruled that the board’s exercise of power was voidable and should be set aside.

JKX appealed and Eclairs cross-appealed. JKX did not contest the trial judge’s factual findings as to the directors’ principal purpose, but challenged his interpretation and application of the proper purposes doctrine. Eclairs challenged the decision as regards the validity of the disclosure notices and the directors’ cause to believe that the notices had been inadequately answered.

The Court of Appeal

The Court of Appeal unanimously rejected the cross appeal, but was divided on the proper purposes aspect.^[9]

Sir Robin Jacob and Longmore LJ allowed the appeal, arguing that the proper purposes doctrine was not applicable to the directors’ power to disenfranchise shareholders. In their view, neither the statutory provisions of the Companies Act 2006 nor JKX’s articles of association limited the power to impose restrictions to the sole purpose of obtaining the requested information. When the board knows, or has reasonable cause to believe, that the information provided is false or materially incorrect, it has the power to restrict the voting rights of the shareholder, subject only to an overriding duty to act in the best interests of the company. In other words, failure to comply with a disclosure notice gives the directors a right to impose restrictions for any purpose which they in good faith consider to be in the interests of the company, including influencing the outcome of a forthcoming AGM. In the majority’s view, to restrict the power only to the purpose of obtaining information would mean to emasculate it and subvert the board’s constitutional authority to act in the best interests of the company.^[10] This interpretation, the judges added, is not unduly harsh on shareholders. They can avert the restriction of their rights by simply providing accurate and timely information.^[11]

In a long and forceful dissent, Briggs LJ rejected the majority’s arguments and defended Mann J’s analysis of the proper purposes doctrine. He stressed that directors, like trustees or other fiduciaries, must exercise their fiduciary powers for the purposes for which they were given. This rule is all the more important where the power is able to affect the constitutional balance of authority between shareholders and directors.^[12] As regards the application of the proper purposes rule to the case at hand, Briggs LJ endorsed Mann J’s view that the directors’ principal purpose was improper. The exercise of the power was not validated by the concurrent existence of a

subordinate but proper purpose, namely the desire to protect the company and its shareholders from the consequences of being kept in the dark about interests in the JKX shares.^[13]

The Supreme Court

All five justices of the Supreme Court agreed to allow the appeal and restore Mann J's decision but expressed different views on the proper course of action for identifying the principal purpose of a power.

Lord Sumption wrote the reasons for allowing the appeal, and the other justices concurred. He pointed out that the Court of Appeal erred in its interpretation of the purposes for which the power to impose restriction notices was granted. When the instrument granting the power is silent, the range of proper purposes is determined by looking at the context in which the power was granted and at its effects.^[14] In the case at hand, all relevant circumstances point to the conclusion that the power to restrict the rights attaching to shares is subsidiary to the power to request information.^[15] The Court of Appeal was wrong to regard it as independent from the need to obtain accurate information. The power to impose restrictions cannot be turned into a tool to manipulate the outcome of shareholders' resolutions, or a weapon of defence against corporate raiders. This would upset the constitutional balance of rights between shareholders and directors, with broader implications on the proper operation of the capital market.^[16]

In Lord Sumption's view, the power to impose restriction notices has three closely related purposes: to induce the shareholder to comply with a disclosure notice; to protect the company and its shareholders against having to decide in the absence of all relevant information; and to impose a sanction on the addressee of a disclosure notice for as long as the non-compliance persists.^[17] None of these purposes was dominant when the JKX board decided to restrict the minority shareholders' rights. As the trial court established, the board's main objective was to influence the outcome of the forthcoming AGM. Consequently, exercise of the power should be set aside, as per Mann J's decision.

Lord Sumption's analysis of the meaning and application of the proper purposes rule in the case of mixed purposes was the main point of disagreement between justices. Drawing on British and Australian precedents, he argued that, when a decision to exercise a fiduciary power is motivated by a mix of proper and improper purposes, the principal (or dominant, or substantial) purpose should be identified using a causal but-for test. The decision will be invalid if the improper purpose is causative, in the sense that, but for its presence, the power would not have been exercised.^[18]

The but-for test for determining the most relevant purpose, Lord Sumption argued, has several advantages over the more conventional test, which equates the principal (dominant, substantive) purpose with the "weightiest" purpose, i.e. the purpose about which directors felt the strongest. First, the former test avoids the practical difficulties of the latter. When multiple concurrent purposes exist, it is difficult and impractical to weigh them and rank them in order of intensity.^[19] Second, as a matter of principle and policy, a fiduciary power must be exercised only for the purposes for which it was given. When, as it is often the case, mixed purposes exist, the law allows the decision to stand as long as it has not caused injustice to the interests it seeks to protect. When injustice occurred, the evaluation of the decision inevitably moves "in the realm of causation."^[20] If without the improper purpose the impugned decision would not have been adopted, then it would be irrational to allow the decision to stand simply because the directors also had proper and weightier considerations in mind. Conversely, if both proper and improper motives existed, and the power would still have been exercised in the absence of the improper ones, there is no compelling reason to set the decision aside.^[21]

In most cases, Lord Sumption conceded, the two tests will lead to the same result. The weightiest purpose is often causative as well. In *Eclairs*, however, the two tests led to different results.^[22] The trial judge found that the weightiest purpose, namely the desire to influence the outcome of the AGM and defeat the corporate raiders, was

improper, which rendered the decision voidable. He also found that the weightiest purpose was not causative. Had the directors applied their minds to the proper purposes of the power to impose restriction notices, they would have reached the same decision. Consequently, under a but-for test, the decision would probably have been allowed to stand. The latter scenario, however, was not pleaded in due course, and could not be taken into account.

Lord Hodge agreed unconditionally with the but-for test to the proper purpose rule, while Lord Clarke and Lord Mance (with whom Lord Neuberger agreed) declined to express a conclusive opinion. In their view, determining the test to be applied where multiple purposes exist requires further debate.

Lord Mance expressed “sympathy” with Lord Sumption’s but-for test, but remained sceptical about the rationales for adopting it. [\[23\]](#) He questioned Lord Sumption’s interpretation of the British and Australian cases that he invoked in support for the causal test, and disagreed that a causal approach has practical advantages over the principal (weightiest) purpose approach. In his view, it may be easier to identify the weightiest purpose than to determine how directors would have acted had they not taken into account improper considerations. [\[24\]](#) Furthermore, the evidential standard required to establish a causal link is unclear. Is probability enough or does the test require certainty that the decision would have been the same? [\[25\]](#)

Analysis

Eclairs is illustrative of the most frequent scenario in which the proper purposes rule is invoked in company law: the exercise of a power affecting the balance of authority between directors and shareholders. In UK company law, the company’s constitution is essential in determining the distribution of decision-making powers between directors and shareholders. In contrast to other jurisdictions, where a board’s authority is provided directly by statute, [\[26\]](#) the Companies Act 2006 has no general provisions on directors’ powers. UK boards receive their powers from the shareholder body, through the provisions of the articles of association. [\[27\]](#) S 171 of Companies Act 2006 reinforces this contractual arrangement, by confining directors’ powers strictly to the purposes for which they were granted.

The board’s temptation to usurp the constitutional distribution of powers is more acute in two contexts. First, when the control of the company is disputed between competing groups, there is a real danger that the board will use its powers to maintain the status quo or to favour a particular group. Second, boards may be tempted to use their powers to undermine the shareholder franchise, by influencing the outcome of a general meeting. There is a long line of precedents relevant to these scenarios, forbidding directors to use their authority for the primary purpose of usurping shareholders’ rights. [\[28\]](#)

Although the danger of misusing the powers to usurp the constitutional balance of authority is real, the proper purposes rule must not unduly restrict directors’ discretion. The courts must be careful not to intervene in the company’s internal management when reviewing the business decisions of directors. It is well established, both in UK company law and elsewhere, that courts will not review the commercial merits of directors’ decisions. [\[29\]](#) Consequently, the test for determining if a power was exercised for proper purposes must balance the need to protect the constitutional allocation of powers inside the company with the need to shield directors’ decision making authority from judicial second-guessing. Taking into account both these considerations, it may seem appropriate to consider proper any purpose that directors believe, in good faith, to be in the best interests of the company and its members as a whole. This is the approach that the majority of the Court of Appeal took in *Eclairs*. [\[30\]](#)

Such a broad understanding of the proper purposes rule, however, is not supported by relevant authority. In *Hogg v Cramphorn Ltd*, Buckley J stated that directors’ belief that what the majority shareholders intended to do was detrimental to the interests of the company is irrelevant to the question of proper purposes. [\[31\]](#) Similarly, in

Howard Smith v Ampol Petroleum, Lord Wilberforce stated that, in determining the range of proper purposes associated with a particular power, the duty to act in the best interests of the company is not directly relevant.^[32] More recently, in *Dryburgh v Scotts Media Tax Ltd*, Lord Glennie examined the relevant precedents and concluded that directors are not allowed to rely on the duty to act in the best interests of the company when they used a power for a collateral purpose.^[33]

The confusion between the two duties may have been caused by their historical interconnection. Before Companies Act 2006, directors' core fiduciary duty and the proper purposes rule were often amalgamated in a compound duty to "act bona fide in what [the directors] consider – not what a court may consider – is in the interests of the company, and not for any collateral purpose." ^[34] Companies Act 2006 reformulates and separates the two duties, thus ending the earlier debates about their independence. S 171(b) codifies the proper purposes rule as a positive duty to exercise powers only the purposes for which they are conferred, as opposed to the negative equitable duty not act for any collateral purpose. The duty to act in the interests of the company is codified in s 172 as a duty to promote the success of the company. The two duties, although distinct, often overlap. Within the objective limits of a power, a director may use it for any purpose which he believes promotes the success of the company. Where a power is used for a collateral purpose, however, it does not matter whether the director honestly believed that in exercising the power as he did he promoted the success of the company, or whether the decision, objectively viewed, was in the company's best interests.^[35]

If the duty to promote the success of the company is not directly relevant to the proper purposes rule, how is the propriety of a purpose determined? The courts have answered this question by developing a four stage test: (1) identify the power whose exercise is challenged; (2) identify the proper purposes for which the power was conferred; (3) identify the substantial purpose for which the power was exercised; and (4) determine if that purpose was proper.^[36] Steps two and three are particularly difficult to apply in a corporate context.

The main practical difficulty in applying step two is that directors' powers are often granted in broad terms, to allow them to be used for a variety of profitable purposes and business opportunities. It is generally agreed that identifying the proper purposes of a power is a matter of interpreting the instrument granting the power and the context in which it was granted.^[37] In company law, the interpretation of the articles of association is the main method by which courts determine if a particular purpose is proper. The delegated powers, however, do not have an intrinsic, exhaustive list of proper purposes. The constitution is rarely the product of detailed debates about the purpose of a specific provision or power. Most provisions are either adopted from the model articles or are broad, boilerplate statements.^[38] In *Howard Smith*, Lord Wilberforce recognised this difficulty and acknowledged that it is impossible to enumerate exhaustively the proper purposes of a power.^[39]

While step two requires an objective analysis of the source and context of the delegation of power, step three is a subjective exercise.^[40] In determining the particular ends that the directors intended to achieve, the courts must take into account the all relevant circumstances that existed when the decision to exercise the power was made.^[41] When the directors are motivated by more than one purpose, the test for legality is the primary or dominant purpose.^[42]

The traditional understanding of the primary or dominant purpose is the purpose that weighted the heaviest in directors' minds when they exercised the power.^[43] In *Eclairs*, Lord Sumption questioned the practicability of the weightiest purpose test, by emphasising the difficulties associated with measuring the intensity of each purpose and arranging them in order of importance.^[44] Lord Sumption's view finds support in Australian jurisprudence and case law. In many cases where multiple purposes exist, it is argued, not even the decision maker is able to identify which purpose was the most influential in his mind. Consequently, it is artificial and meaningless to ask the court to evaluate the purposes and select a dominant one.^[45] Allowing the courts to uphold or invalidate a decision based on what they consider to be the most influential purpose in directors' minds may give judges the power to interfere with directors' business judgment, which goes against the fundamental

principle of judicial non-interference with a company's management.^[46]

The but-for test avoids these pitfalls. It neither requires an evaluation of the intensity of purposes, nor creates the danger of judicial second-guessing of business decisions. When directors are actuated by both proper and improper purposes, the proper purpose rule is breached only if there is an improper purpose which is causative, in the sense that, but for its presence, the decision would not have been taken as it was. In *Eclairs*, Lord Sumption relied on *Whitehouse v Carlton Hotel Pty Ltd*^[47] as support for the causal test. Although the but-for test analysis was *obiter* in *Whitehouse*, numerous other Australian courts have applied this test.^[48] The test was also applied by British courts, mostly in the context of trustees' powers of appointment. The test has doctrinal support as well. After reviewing a significant number of authorities on the application of the proper purposes rule, the leading treatise on legal powers concludes that "the 'but for' test seems more appropriate and more consistent with the reported cases."^[49]

A causal approach to the proper purposes doctrine has close parallels to the fiduciary duty to take into account relevant considerations and omit irrelevant ones (the duty of genuine consideration).^[50] This duty is not breached automatically when a relevant consideration is ignored, or when an irrelevant one is taken into account. A fiduciary will be in breach if it can be demonstrated that, but for his ignorance or misunderstanding of a relevant consideration, or but for the presence of an irrelevant consideration, he would have acted differently, or not at all.^[51]

Conclusion

For the most part, the distinction between the weightiest and the causative tests for identifying the principal purpose may be irrelevant. The weightiest purpose will usually be causative as well. When the two tests lead to different results, as in *Eclairs*, identifying the most suitable test becomes a pressing concern. Lord Sumption's interpretation of the proper purposes rule has strong intellectual appeal. Allowing a decision to stand when it can be proven that the same result would have been achieved if the improper purposes had been ignored enhances the certainty and finality of fiduciaries' decisions and reinforces the general principle against interference with their exercise of discretion. The Supreme Court's decision in *Eclairs*, however, could only suggest these developments in general terms. The trial judge investigated only tentatively the causal link between the improper purpose of aiming to influence the outcome of the AGM and the exercise of the power to impose restrictions, and refused to allow any point on causation to be raised. It is to be hoped that the Supreme Court will follow Lord Sumption and adopt the but-for test in the future.

^[1] S 171(b) codifies the pre-existing law on the subject. See *Re West Coast Capital (LIOS) Ltd* [2008] CSOH 72, per Lord Glennie at [21].

^[2] *Ex Parte Hill* (1883) 23 Ch D 695 at 704, per Bowen LJ.

^[3] [2015] UKSC 71; [2016] 1 BCLC 1.

^[4] *Eclairs Group Ltd and another v JKC Oil and Gas plc and others* [2013] EWHC 2631 (Ch); [2014] 1 BCLC 202.

^[5] [2014] 1 BCLC 202 at 265.

^[6] *Ibid.* at 273.

^[7] *Ibid* at 274.

^[8] *Ibid* at 271.

[9] *Eclairs Group Ltd and another v JKK Oil & Gas plc and others* [2014] EWCA Civ 640; [2014] 2 BCLC 164.

[10] [2014] 2 BCLC 164 at 201-202.

[11] *Ibid.* at 201.

[12] *Ibid.* at 199.

[13] *Ibid.* at 197-198.

[14] [2016] 1 BCLC 1 at 18.

[15] *Ibid.* at 19.

[16] *Ibid.*

[17] *Ibid.* at 18.

[18] *Ibid.* at 11-13.

[19] *Ibid.* at 11.

[20] *Ibid.*

[21] *Ibid.*

[22] *Ibid.*

[23] *Ibid.* at 25

[24] *Ibid.*

[25] *Ibid.*

[26] See e.g. section 141(a) of the Delaware General Corporation Law.

[27] David Kershaw, *Company Law in Context: Text and Materials*, 2nd ed. (Oxford: OUP, 2012) 191.

[28] *Fraser v Whalley* (1864) 2 H & M 10; *Cannon v Trask* (1875) LR 20 Eq 669; *Anglo-Universal Bank v Baragnon* (1881) 45 LT 362; *Piercy v S Mills & Co* [1918-19] All ER Rep 313; *Hogg v Cramphorn Ltd* [1966] 3 All ER 420; *Howard Smith Ltd v Ampol Petroleum Ltd and others* [1974] 1 All ER 1126.

[29] See *Carlen v Drury* (1812) 1 Ves & B 154, 158, per Lord Eldon: "This court is not to be required to take the management of every playhouse and brewhouse in the Kingdom". See also Andrew Keay, *Directors' Duties*, 2nd ed. (Bristol: Jordans, 2014) 110-111; Geraint Thomas, *Thomas on Powers*, 2nd ed. (Oxford: OUP, 2012) 444.

[30] [2014] 2 BCLC 164 at 201-202.

[31] *Hogg v Cramphorn Ltd* [1966] 3 All ER 420 at 428.

[32] *Howard Smith Ltd v Ampol Petroleum Ltd and others* [1974] 1 All ER 1126 at 1134. See also *Regentcrest v Cohen* [2001] BCC 494, 514, per Jonathan Parker J.

[33] *Dryburgh v Scotts Media Tax Ltd* [2011] CSOH 147 at [92].

[34] *Smith & Fawcett Ltd, Re* [1942] 1 All ER 542 at 543, per Greene LJ. See also *JJ Harrison (Properties) Ltd v Harrison* [2002] 1 BCLC 162 at 173, per Chadwick LJ.

[35] *Extrasure Travel Insurance Ltd v Scattergood* [2003] 1 BCLC 598; *Advance Bank v FAI Insurances* (1987) 12 ACLR 118 at 137; *Whitehouse v Carlton Hotel Pty Ltd* (1987) 11 ACLR 715 at 721.

[36] *Howard Smith Ltd v Ampol Petroleum Ltd and others* [1974] 1 All ER 1126 at 1134; *Madoff Securities International Ltd (in liquidation) v Raven and others* [2013] EWHC 3147 (Comm) at [195]-[196].

[37] *Peskin v Anderson* [2001] 1 BCLC 372; *Criterion Properties plc v Stratford UK Properties LLC and others* [2006] 1 BCLC 729. Richard Nolan, “Controlling Fiduciary Power” (2009) 68(2) Cambridge Law Journal 293 at 299.

[38] Kershaw, *supra* note 27 at 395-396.

[39] *Howard Smith Ltd v Ampol Petroleum Ltd and others* [1974] 1 All ER 1126 at 1134 (“To define in advance exact limits beyond which directors must not pass is, in their Lordships’ view, impossible. This clearly cannot be done by enumeration, since the variety of situations facing directors of different types of company in different situations cannot be anticipated”). See also David Kershaw, “The Illusion of Importance: Reconsidering the UK’s Takeover Defence Prohibition” (2007) 56(2) International & Comparative Law Quarterly 267 at 282-289.

[40] Nolan, *supra* note 37 at 299.

[41] Thomas, *supra* note 29 at 454.

[42] *Hirsche v Sims* [1894] AC 654, PC; *Hindle v John Cotton Ltd* (1919) 56 SLT 625; *Mills v Mills* (1938) 60 CLR 150, Aust HC; *Howard Smith Ltd v Ampol Petroleum Ltd and others* [1974] 1 All ER 1126 at 1131.

[43] [2016] 1 BCLC 1 at 10.

[44] *Ibid.*

[45] David Bennett, “The Ascertainment of Purpose when Bona Fides are in Issue: Some Logical Problems” (1989) 12(1) Sydney Law Review 5 at 7; Keay, *supra* note 29 at 101-102.

[46] Keay, *supra* note 29 at 101.

[47] *Whitehouse & Anor v Carlton Hotels Pty Ltd* (1987) 61 ACLR 715 at 721 (“As a matter of logic and principle, the preferable view would seem to be that, regardless of whether the impermissible purpose was the dominant one or but one of a number of significantly contributing causes, the allotment will be invalidated if the impermissible purpose was causative in the sense that, but for its presence, the power would not have been exercised”).

[48] Keay, *supra* note 29 at 103-104.

[49] Thomas, *supra* note 29 at 454.

[50] *Pitt v Holt and Futter v Futter* [2011] 2 All ER 450 at 478-479.

[51] Thomas, *supra* note 29 at 550-551.

